



FR-4915-01-P

## SURFACE TRANSPORTATION BOARD

[Docket No. FD 36075]

### The Illinois State Toll Highway Authority—Petition for Declaratory Order

By petition filed on November 23, 2016, the Illinois State Toll Highway Authority (Tollway) seeks a declaratory order confirming that, in its effort to acquire permanent and temporary easements for the construction of five highway bridges over railroad tracks owned and operated by Soo Line Railroad Company, d/b/a Canadian Pacific Railway (CP) in Chicago, Ill., the Tollway's state law eminent domain authority is not preempted by federal law under 49 U.S.C. 10501(b). The Tollway seeks expedited consideration and has submitted a procedural schedule that provides for comment by CP as well as a period for public comment.

On December 9, 2016, CP filed a "limited reply" in opposition to the Tollway's request for a declaratory order and proposed procedural schedule. CP argues that the Tollway disregards the fact that the construction of the five highway bridges would lock the layout of the tollway into an alignment that goes across and through CP's Bensenville Yard. Therefore, CP asserts that the scope of this proceeding should be broadened to consider the ramifications that the Tollway's project would have on the Bensenville Yard. CP also requests that the Board allow limited discovery and proposes a procedural schedule that allows for discovery, CP's substantive reply, and public comment.<sup>1</sup> In the

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<sup>1</sup> On December 21, 2016, the Tollway filed a motion for leave to file a surreply to CP's December 9, 2016 limited reply. On January 3, 2016, CP filed a motion for leave to file a reply to the Tollway's surreply. The Board will grant both motions and will consider the filings in the interest of compiling a more complete record. See City of

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event the Board were to disallow discovery, CP proposes an alternative procedural schedule, with replies due on February 23, 2017.

As discussed below, the Board will institute a proceeding to consider whether 49 U.S.C. 10501(b) preempts the Tollway's eminent domain authority to acquire the temporary and permanent easements needed to construct highway bridges over CP's rail tracks, as well as to consider the implications of the Tollway's prospective plans to cross or go through the Bensenville Yard.

## BACKGROUND

The construction of the Western Access Interchange, which involves the proposed construction of five highway bridges over CP's railroad tracks, is one stage of the Tollway's Elgin O'Hare Western Access Project (EOWA Project), a multi-stage project to improve the transportation infrastructure near O'Hare International Airport (O'Hare) by creating access to the western side of O'Hare. (Tollway Pet. 2; CP Reply 4.) The EOWA Project involves the construction of an east-west tollway (the Western Access Tollway) that approaches O'Hare from the west and a north-south tollway (the Western Bypass) that would connect I-90 north of O'Hare to I-294 south of O'Hare via the airport's western perimeter. (CP Reply 4.) The Tollway's petition pertains to the Western Access Interchange, which is the planned interchange between these two new tollways.

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Alexandria, Va.—Pet. for Declaratory Order, FD 35157 (STB served Nov. 6, 2008) (allowing reply to reply “[i]n the interest of compiling a full record); Denver & Rio Grande Ry. Historical Found.—Pet. for Declaratory Order, FD 35496, slip op. at 3 (STB served Feb. 23, 2012).

CP has requested that the Board broaden the scope of this proceeding to consider the southern leg of the Western Bypass, because “construction of the Western [Access] Interchange commits the Western Bypass to an alignment through Bensenville Yard,” which is located immediately south of O’Hare and is CP’s only rail yard in the Chicago Terminal. (CP Reply 9.) CP states that construction of the Western Access Interchange involves plans to build the highway bridges and a section of the southern leg of the Western Bypass to Irving Park Road, just north of the Bensenville Yard and that the Tollway has already commenced construction on a part of the tollway immediately south of the Bensenville Yard, from I-294 north to the yard’s southwest property line. Id. Thus, CP argues that it is inevitable that the Tollway will seek to complete the Western Bypass through the Bensenville Yard.

The Tollway states that, while its ultimate goal is to connect the Western Access Tollway to I-294, the current plan is for the Western Access Tollway to stop at Irving Park Road, north of the Bensenville Yard. (Tollway Pet. 30.) The Tollway states that the phases involving the crossing of the Bensenville Yard are the last two phases of the entire EOWA Project, with construction projected to start no earlier than 2020. (Tollway Pet. 16-17, 30.) The Tollway asserts that CP’s objections in this proceeding to these last phases of construction are premature, as the plans for these phases have not developed past the conceptual layout stage, and it would thus be impossible to determine whether the phases would unreasonably interfere with railroad operations. (Tollway Pet. 31.) The Tollway states that “if and when the Tollway elects to pursue this work and [CP] refuses to cooperate, the Tollway will return to the Board with a subsequent petition related to the Bensenville Yard issues.” (Tollway Pet. 30.) The Tollway also notes that CP’s

argument for considering the impact on the Bensenville Yard has been dismissed as premature by the United States District Court for the Northern District of Illinois, see Soo Line R.R. v. Ill. State Toll Highway Auth., Case No. 15-C-10328 (N.D. Ill. Mar. 29, 2016), and CP's appeal of the dismissal is currently pending before the United States Court of Appeals for the Seventh Circuit.

## DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. 554(e) and 49 U.S.C. 1321<sup>2</sup> to issue a declaratory order to eliminate a controversy or remove uncertainty in a case that relates to the subject matter jurisdiction of the Board. The Board has broad discretion to determine whether to issue a declaratory order. See Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). The Board may also provide guidance to assist other government agencies and courts in appropriate circumstances. See U.S. Envtl. Prot. Agency—Pet. for Declaratory Order, FD 35803 (STB served Dec. 30, 2014); Mid-Am. Locomotive & Car Repair, Inc.—Pet. for Declaratory Order, FD 34599 (STB served June 6, 2005). In this case, it is appropriate to institute a proceeding so that the Board can address whether § 10501(b) preempts the Tollway's eminent domain authority to acquire the temporary and permanent easements needed to construct highway bridges over CP's tracks, as well as the potential implications of crossing or going through the Bensenville Yard. The Tollway and CP have presented related issues that ultimately may be relevant to future construction plans and activities for the EOWA Project. Therefore, it is

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<sup>2</sup> The Surface Transportation Board Reauthorization Act of 2015, P.L. No. 114-110, recodified certain provisions of title 49, United States Code, redesignating 49 U.S.C. 721 as § 1321.

appropriate to institute a proceeding to provide guidance on the issues raised by both the Tollway and CP.

The Board will establish a procedural schedule for the filing of additional pleadings. The Tollway's petition will serve as its opening statement. CP's substantive reply and comments from other interested persons will be due by February 23, 2017. In its substantive reply, CP should provide an analysis that details the impact of the proposed construction projects on its rail operations. The Tollway and other interested parties may respond to CP's reply only on the issue of the potential crossing of the Bensenville Yard by March 16, 2017.

CP also requests that the Board allow for limited discovery on the Tollway's alternative alignment options, the Tollway's plans regarding the Bensenville Yard, and the basis of the Tollway's expert opinions. CP's request for discovery will be denied. The Board often does not provide for discovery in declaratory order proceedings.<sup>3</sup> Nor is it apparent that discovery is necessary here. Alignment options for the tollway were analyzed and discussed in the Environmental Impact Statements for the EOWA Project, which are publicly available and which CP cites in its reply. (Tollway Surreply 4; CP Reply 8.) These Environmental Impact Statements also provide information regarding the Tollway's prospective plans for the Bensenville Yard.<sup>4</sup> To the extent that CP wishes to challenge the Tollway's expert witness's findings on and observations of CP's rail

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<sup>3</sup> See, e.g., CSX Transp. Inc.—Pet. for Declaratory Order, FD 33388 (Sub-No. 101), slip op. at 5 (STB served Aug. 27, 2008).

<sup>4</sup> See Elgin O'Hare-West Bypass Study: Tier Two Final Environmental Impact Statement (Oct. 2012), § 3.4.2. The Final Environmental Impact Statements are available on the Illinois Department of Transportation's website at <http://apps.dot.illinois.gov/fileexplorer/?search=environment/Elgin-Ohare%20final%20EIS>.

operations, CP possesses the information on its own operations needed to call into question the bases for the expert witness's conclusions. For these reasons, the Board will not order discovery in this proceeding.

It is ordered:

1. A proceeding is instituted.
2. CP and other interested persons may file substantive replies to the Tollway's petition by February 23, 2017.
3. The Tollway and interested persons may file responses to CP's reply, limited to only the issue of the Bensenville Yard, by March 16, 2017.
4. CP's request for limited discovery is denied.
5. The Tollway's motion for leave to file a surreply is granted.
6. CP's motion for leave to file a reply to the Tollway's surreply is granted.
7. Notice of the Board's action will be published in the Federal Register.
8. This decision is effective on its service date.

Decided: January 17, 2017.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Kenyatta Clay

Clearance Clerk

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